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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of

Telecommunications Services

Inside Wiring

Customer Premises Equipment

In the Matter Of

Implementation of the Cable

Television Consumer Protection
and Competition Act of 1992:

Cable Home Wiring

CS Docket No. 95-184

MM Docket No. 92-260

**COMMENTS OF INDEPENDENT CABLE &
TELECOMMUNICATIONS ASSOCIATION**

The Independent Cable and Telecommunications Association ("ICTA"), by its counsel, submits these comments in response to the Further Notice of Proposed Rulemaking ("Further Notice") in the above-captioned proceeding. ICTA's comments are limited to addressing selected portions of the Commission's proposed procedural mechanism for the disposition of building-by-building and unit-by-unit home run wiring since ICTA has heretofore in this proceeding exhaustively briefed and argued the various statutory authority, constitutional and policy issues surrounding such disposition.

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DISPOSITION OF HOME RUN WIRING

From the outset of the Commission's deliberations over the disposition of home run wiring, ICTA has forcefully advocated that the best means to advance competition in the MDU marketplace was to authorize a wholesale movement of the demarcation point to the junction where the common wire meets the individual wire dedicated to a particular residential unit. This remains ICTA's preferred solution. In the absence of such an outcome, ICTA supports the Commission's proposal to implement a procedural mechanism to govern the disposition of home run wiring during a transition of a MDU property from one service provider to another or the overbuilding of a MDU property by a second provider. ICTA believes, however, that the following clarifications are necessary to ensure that the procedural mechanism is free of any "loopholes" and therefore actually operates to advance a competitive environment.

1. The Commission must define the phrase "an enforceable legal right to remain on the premises." The Commission has recommended that its proposed procedural mechanism "would apply only where the incumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner. [footnote omitted] In other words, these procedures would not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home run wiring on the property." Further Notice, ¶ 34. ICTA does not disagree with the Commission's conclusion that its rules should not apply under circumstances where the MDU owner has no right to terminate the incumbent provider's access to the premises (or in a mandatory access state where a tenant has not in fact terminated its service with the incumbent provider), thereby necessitating that provider's continuing use of the home run wiring. ICTA is greatly concerned, however, that an incumbent provider will merely

assert, in what has become a routine letter writing campaign, that it has a continuing enforceable right of access without any substantive grounds for such assertion. In such fashion, the Commission's objective of ensuring the availability of home run wiring for competitive use could be easily subverted since its procedural rules could never be triggered by the MDU owner.

The Commission should forestall such anti-competitive maneuvering by creating a presumption that the incumbent provider does not have an enforceable legal right to remain on the premises. Thus, the Commission's rules would apply in the event of any dispute between the parties concerning the validity of any continuing access. Such a presumption would place the burden squarely upon the incumbent provider claiming an enforceable legal right to remain on the premises to initiate whatever judicial proceeding is appropriate to prove the merits of such a right. In the absence of any actual enforcement action surrounding the access claim, the Commission's rules would have full force and effect.

2. The Commission should clarify that any service termination by the incumbent provider prior to the end of the established date certain cannot abrogate any contractual right of the MDU owner and that such termination cannot occur in advance of the alternative service provider's initiation of service. One of the salient goals underlying this proceeding is the fostering of competition in the multifamily dwelling marketplace through accomplishing a seamless transition between service providers in either a building-by-building or unit-by-unit cutover.^{1/} In establishing a procedural mechanism, it is crucial that the time lines adopted do not

^{1/} In this regard, in all circumstances involving the disposition of either home run or cable home wiring, ICTA supports the Commission's proposal that alternative providers or the MDU owner may operate as the subscriber's agent to effectuate a service cut-over and may purchase the cable home wiring in lieu of a tenant who chooses not to do so.

inadvertently create an opportunity for the incumbent provider to terminate its service to the building or to the unit in advance of the ability of the alternative service provider to initiate service to that building or unit. The primary reason ICTA proposed an end date for the transition was to enable the alternative service provider to have sufficient notice as to its ability to use the home run wiring on that date certain or have its own home run wiring in place on that date certain so that no loss of service to tenants would occur. The Commission proposes, however, to allow the incumbent provider to terminate its service, apparently immediately upon notice to the relevant party, before the end of the ninety day notice period for a building-by-building transition or before the end of the seven day notice period for a unit-by-unit transition (or any other date certain that may be adopted, see number 5 below). According to the Commission's rules, if that election is removal and restoration, for example, the incumbent provider must do just that prior to the expiration of the ninety or seven day period.

Unless a mandate for coordination issues from the Commission causing the incumbent provider to cooperate with the alternative service provider such that no individual home run wire (or cable home wiring) is removed before the alternative service provider's replacement wire is in place and functional, numerous tenants will be left without cable service potentially for weeks. Clearly, MDU owners and tenants facing such a prospect will be extremely reluctant if not absolutely resistant to transitioning service providers. ICTA therefore urges the Commission to alter its proposal such that the incumbent provider cannot terminate its service in advance of whatever date certain is ultimately adopted by the Commission, unless both the incumbent provider and the alternative service provider agree in writing on a different date certain.

Any sale of the wiring or abandonment can obviously occur on that date certain without any loss of service since the wiring will be immediately accessible to the alternative service provider. With respect to an election to remove and restore, the rules should simply provide that the incumbent provider has up to thirty days after the date certain to initiate and complete that process in a building-by-building transition and up to seven days after the date certain to accomplish same in a unit-by-unit transition. This enables the alternative service provider to have sufficient time to rewire the premises by the date certain with no risk of a loss of service to tenants.

Requiring the incumbent provider to maintain service until the date certain unless a contrary agreement is reached by the parties causes no harm to the incumbent provider who will continue to collect revenues from subscribers during that entire time period. At the very least, the Commission should clarify that its "advance termination" rule, should the Commission decide not to alter same, will not apply where a private contractual agreement between the parties requires the provision of service until the date certain.

3. The Commission should adopt rules to ensure that incumbent providers electing removal in fact restore the premises to the condition existing immediately prior to the removal. ICTA agrees with the Commission that any removal of the home run or cable home wiring by the incumbent provider must also include a full restoration of the MDU building or unit to its prior condition. ICTA does not believe, however, that the MDU owner should absorb the risk that the incumbent provider will fall short of what constitutes a complete restoration. That risk not only includes the monetary damage associated with repair completion and the overall diminution in the value of a building left damaged by such removal, but also the potential tort liability for any

injuries that might stem from an unsafe building condition during or after such removal process.

ICTA recommends that the Commission require any incumbent provider electing removal to post a bond prior to the commencement of any removal sufficient in amount to eliminate a MDU owner's risk, but in no event less than \$25,000.

4. The Commission should not establish a price for an elected sale of home run wiring.

The Commission seeks comment on whether guidelines, a default price or a general rule or formula should be established to govern the price for an elected sale of the home run wiring.

ICTA adamantly opposes all three options and supports the Commission's own preference that the parties freely negotiate the sales price.

There is no evidence that market forces would not provide adequate incentives for the parties to reach a reasonable price. The incumbent provider's alternative options of removal or abandonment are not as beneficial as the sales option since even a minimal purchase price after recoupment and/or depreciation represents a windfall to the provider and it would be highly unlikely that a MDU owner would not agree to at least reimburse an incumbent provider's unrecovered expenditures if properly documented. The MDU owner has an incentive to negotiate a reasonable purchase price because of its interest in avoiding a rewiring of the premises with the attendant aesthetic, disruption and inconvenience downsides that have in part been the impetus for competitors seeking Commission redress in the first instance. Moreover, the MDU owner in many instances will require the alternative service provider either to purchase the home run wiring outright or to reimburse the owner for its purchase. The alternative service provider has an incentive to negotiate a reasonable purchase price both because an ability to use the existing home run wiring is often a precondition to that provider's obtaining access to the premises to

provide its video services and because a reasonable purchase price would be less than it would cost that alternative provider to rewire the premises itself.

Finally, ICTA is greatly concerned that any Commission regulatory intercession to restrict what would otherwise be free marketplace negotiations will only serve to subject the proposed procedural mechanism to a potential judicial challenge on takings grounds.

5. The Commission should consider shortening the time frame for a unit-by-unit disposition of the home run wiring. With respect to the proposed unit-by-unit procedures, ICTA submits that the Commission's time line is simply too lengthy to foster tenant service choices. In a head-to-head competition scenario, it is critical that the new service provider be able to deliver promised services to tenants promptly as the marketing window can be too easily preempted by an incumbent provider with essentially a ninety day lead time to alter services and rates and institute short-term promotional offers, often tied to the tenant's agreement to sign up for a six to twelve month subscription. It is a relatively simple proposition to trade home run wiring back and forth between service providers as on any given day it would be unlikely that more than a few individual units would be switched. Moreover, the actual bare decision as to which option to elect is neither intellectually challenging nor time-consuming. This will be especially true within a few months after adoption of the procedural mechanism since most companies will establish a corporate policy that will be implemented on a system-wide or company-wide basis.

Thus, ICTA recommends that the incumbent provider be entitled to fifteen days notice from the MDU owner that the owner intends on allowing a second provider to access the premises. The incumbent provider should provide its written election notice by the close of that same fifteen day period. If the incumbent provider elects abandonment, that election should be

effective immediately since no more action is required to effectuate that decision than an actual wiring switch when a tenant requests one. If the incumbent provider elects removal, that removal should take place within seven days after the second provider provides notice to the incumbent provider that the replacement wire is installed and functional. If the incumbent provider elects a sale, then the parties should have a maximum thirty day period to negotiate a purchase price. Upon an agreement as to a purchase price, either before or at the close of the thirty day period, the parties would have a maximum of seven days to effectuate the sale on a per unit basis if there has been no lump sum purchase. To the contrary, if during that thirty day negotiating period either party terminates discussion because an unmoveable impasse has been reached, or if the thirty day period has drawn to a close, the incumbent provider would have seven days to elect removal or abandonment, the time frames for which would be the same as set forth directly above.

ICTA also strongly recommends for both a building-by-building or unit-by-unit transition that the incumbent provider be required to include its asking price for the home run wiring at the time of its written notice electing a sale. The determination of an asking price is easily ascertained and to do otherwise allows the incumbent provider to consume most of the thirty day period delaying its communication of its asking price -- an act not conducive to good faith negotiations.

6. The Commission should establish penalties for an incumbent provider's failure to conform to an election or failure to comply with the rules in the set time frame.


ICTA fully supports the Commission's tentative conclusion that an enforcement penalty is necessary to ensure that the Commission's pro-competitive policy objective in adopting a

procedural mechanism is met. ICTA recommends the adoption of a forfeiture provision in the minimum base amount of \$27,000 for each time the incumbent provider fails to honor its one-time election as to the disposition of home run wiring in either a building-by-building or unit-by-unit transition, and a forfeiture provision in the minimum base amount of \$15,000 for each time the incumbent provider fails to conform to the established time deadlines. This represents an amount far less than what the alternative service provider would have to spend in rewiring the property due to a misrepresented election. In addition, the Commission should specifically enforce any sale or abandonment election.

In conclusion, ICTA urges the Commission to adopt its proposed procedural mechanism, with the amendments set forth by ICTA above, in an expeditious fashion. As the Commission well knows, the nearly four year delay in the resolution of this issue has severely hampered the development of competition in the MDU marketplace. No just cause exists for any further delay.

Respectfully submitted,

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Dated: September 25, 1997

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CERTIFICATE OF SERVICE

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BY:

A handwritten signature in black ink, appearing to read "Deborah C. Costlow". The signature is written in a cursive style with a large initial "D".

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